



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 259 OF 2011**

GEORGE ANWAR MBWANA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

*(From original Conviction and Sentence in Criminal Case No.1176 of 2011 of the Chief Magistrate's Court at Mombasa – Hon. Kirui - SPM)*

**JUDGMENT**

**GEORGE ANWAR MBWANA** hereinafter referred to as the Appellant was Convicted and Sentenced to ten (10) years imprisonment and in addition fined Ksh. 1 million for the offence of trafficking in Narcotic drugs contrary to section 4 as read with Section 4(a) of the Narcotics drugs and Psychotropic substances (Control Act Act No. 4 of 1994).

The particulars being that:-

***“On the 8th day of April, 2011 at Mwembe Tayari along Raha Leo street Mombasa County trafficked in Narcotic drugs to wit ten (10) satchets of Heroin with a street value of Ksh. 3,000/= by way of conveying in contravention of the Act”.***

The brief facts of this case are that on the 8th day of April, 2011 police constables **CYRUS MURIITHI** and **ANDERSON KATAMA (PW 1 and PW 2)** were on patrol duties along Raha Leo street near Mwembe Tayari when they met the Accused who upon noticing them changed directions and bolted towards the other direction. They chased and arrested him and upon conducting a search they recovered ten (10) satchets from his left pocket which they suspected to be heroin. They took him to police station where he was booked with trafficking of narcotics drugs. The exhibits were taken to a Government Chemist who upon analysis found them to be heroin.

The appellant in this case is charged with trafficking by way of conveying.

Section 2 of the Narcotic Drugs and Psychotropic substances (Control) Act defines **“trafficking”** in the following manner,

***“trafficking means the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect***

*thereof*".

Convey is defined by the Course Oxford English dictionary thus,

***"Transport or carry to a place"***.

In the present case the Accused was chased and arrested and the drugs found in his pocket.

There is no evidence to the effect that he was taking the drugs to another place or to another person. There is no evidence to show that the drugs were not for his own consumption.

The evidence before the Court was that of possession but not conveying.

Section 179 (2) of the Criminal Procedure Code provides,

***"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it"***.

I am of the considered view that the Conviction for trafficking under section 4(a) of the Act was not safe.

I accordingly alter the finding to that of lesser offence of possession of narcotic drugs contrary to section 3(a) of the Act and reduce the Sentence of ten (10) years imprisonment and a fine of Ksh.1 million to that of five (5) years imprisonment only.

Accordingly the appellant will serve five (5) years imprisonment from the time of Conviction.

To that extent only does this appeal succeed.

Judgment delivered dated and signed in open Court this **16th** day of **May, 2014**.

.....

**M. MUYA**

**JUDGE**

**16TH MAY, 2014**

**In the presence of:-**

Learned State Counsel Mr. Ayodo

The Appellant present

Court clerk Musundi